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No. 93-2070

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

TEXAS EASTERN TRANSMISSION CORPORATION,
Petitioner,

v.

FIDELITY & CASUALTY INSURANCE COMPANY OF NEW YORK, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR THE PETITIONER

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1. Respondents do not seriously dispute that the lower courts' determination that ICI is a "foreign state" under the FSIA conflicts with at least three nonappealable district court decisions in other Circuits. (Opp. 16-19 & n.8.) They argue, however, that this conflict is not worthy of this Court's review because (a) the conflict is primarily factual rather than legal in nature, and (b) a conflict involving unappealable district court decisions does not warrant a grant of certiorari. Neither point withstands scrutiny.

In order for ICI to qualify as a "foreign state" under the FSIA, "a majority of [its] shares or other ownership interest [must be] owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b)(2). The court in *Mobil Corp.* v. *Abeille Gen. Ins. Co.*, No. H-89-3877, 1990 WL 504828 (S.D. Tex. Nov. 6, 1990) (App. 332-39), *appeal dismissed*, 984 F.2d 664 (5th Cir. 1993), concluded that ICI did not fall within this statutory definition. *Mobil* construed Section 1603(b)(2) to require that the "legal title" of the shares or other ownership interests rest with the foreign government, which is not the case with ICI. (App. 334.) In addition, when, as with ICI, "other ownership interests" are relied on as the basis for the assertion of "foreign state" status, the *Mobil* court read the statute to require the consideration of two factors: "'the degree to which the entity discharges a governmental function, and the extent of state control over the entities operations.'" (*Id.*) (quoting *Edlow Int'l Co.* v. *Nuklearna Elektrarna Krsko*, 441 F. Supp. 827, 832 (D.D.C. 1977)). Two other district courts, in the Eighth and Ninth Circuits, have followed *Mobil*.[1/]

[1/] *Aluminum Co. of Am.* v. *Admiral Ins. Co.*, No. C93-32C (W.D. Wash. Apr. 9, 1993) (App. 313-15); *Murphy Oil USA, Inc.* v. *United States Fidelity & Guar. Co.*, No. 91-1157, 1992 WL 465701 (W.D. Ark. Dec. 21, 1992) (App. 316-31). Although the Eighth Circuit in *Murphy Oil* later ordered the district court to conduct a limited evidentiary hearing, *Murphy Oil USA, Inc.* v. *United States Fidelity & Guar. Co.*, No. 93-1207

(continued...)

The courts below, presented with the same factual representations as were made in *Mobil*, reached a different legal conclusion based upon a dramatically different understanding of Section 1603(b)(2). Unlike *Mobil*, the courts below did not require legal title to rest with the Government of Ireland. Nor did they interpret the FSIA to require consideration of the two additional factors recited in *Mobil* for determining foreign sovereign claims. Instead, they held that the "administration procedure," whereby the stock of ICI's holding company, SAT, was placed in trust for the benefit of the Irish Minister of Industry and Commerce, was sufficient to convert ICI into a "foreign state." (App. 23, 81, 295-98.)

Respondents attempt to denigrate the significance of these conflicting interpretations of the FSIA by claiming that ICI's status under the FSIA is a factual rather than a legal issue. There has never been any material dispute, however, in this case or in *Mobil*, *Murphy Oil*, or *ALCOA*, concerning the facts of ICI's relationship to the Irish government. The essential issue in all of these cases has been the legal significance under the FSIA of these undisputed facts. *Mobil*, *Murphy Oil*, and *ALCOA* applied one interpretation of the FSIA to these undisputed facts to reach one legal conclusion; the courts below applied another construction of the FSIA to these same

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1/(...continued)
(8th Cir. June 21, 1993) (Opp. RA1-RA3), the court of appeals never questioned the district court's legal analysis, which included a lengthy review of *Mobil* and an adoption of *Mobil*'s "persuasive" reasoning. (App. 330.) Moreover, soon after the court of appeals' limited remand order, ICI itself voluntarily dismissed the appeal, leaving the district court's opinion fully intact and fully in conflict with the decisions below. *Murphy Oil USA, Inc.* v. *United States Fidelity & Guar. Co.*, No. 93-1207 (8th Cir. Aug. 30, 1993) (Opp. RA4-RA5).

undisputed facts to reach the opposite legal conclusion.[2/] Indeed, respondents themselves tacitly admit that the conflict here is legal in nature. Although at times they assert that the issue is "fact-bound," they switch gears when discussing *Mobil*, attacking the merits of the decision as based on an improper construction of Section 1603(b)(2) — clearly a legal question. (Opp. 16-19.)[3/]

As explained in the Petition, the conflict here is the equivalent of a conflict in the Circuits. (Petn. 13.) Respondents do not dispute that a decision holding that a removing party is not a "foreign state" under the FSIA is not appealable. *See* 28 U.S.C. § 1447(d). Indeed, the Fifth Circuit in *Mobil*, in a published decision, expressly held that the district court's decision on the issue was final and unappealable. *Mobil Corp.* v. *Abeille Gen. Ins. Co.*, 984 F.2d 664 (5th Cir. 1993). At present, then, district courts in the Fifth Circuit apply one standard of FSIA removal and remand and district courts in the Third Circuit apply another. Because the Fifth Circuit is statutorily barred from reviewing the issue in this procedural context, only this Court can

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[2/] The Third Circuit's recitation of a "clearly erroneous" standard of review was directed solely to the undisputed, underlying facts, not to the legal conclusion based on these facts. (App. 22-23 & n.8.) It is well settled that the ultimate conclusion whether an entity constitutes a "foreign state" under the FSIA is a legal question of subject matter jurisdiction reviewable *de novo*. *See, e.g.*, *General Elec. Capital Corp.* v. *Grossman*, 991 F.2d 1376, 1380 (8th Cir. 1993).

[3/] Even if the lower courts' disagreement over the issue of ICI's status concerned a purely factual issue, review by this Court would nevertheless be appropriate. *See* R. Stern, *et al.*, *Supreme Court Practice* 189-90 (7th ed. 1993) ("Of course, if two courts of appeals have . . . made different findings of fact as to the same subject matter, certiorari may be granted to review either decision so as to preserve uniformity of decision among circuits.").

resolve the controversy.[4/] This Court has previously granted certiorari to review conflicts created by district courts in procedural contexts that are much less compelling than in this case.[5/]

Respondents attempt to minimize the importance of this conflict by contending that it "does not present an issue of importance to anyone other than the parties." (Opp. 12.) The existence of four entirely separate insurance coverage disputes in different Circuits — all involving ICI — belies this contention. Of course, the issue is not limited to disputes involving ICI; the "foreign state" issue in this case can and does arise in cases involving other insurers.

The most recent example of this phenomenon is the billion-dollar insurance coverage litigation arising from the *Exxon Valdez* oil spill. Exxon Corporation has sued its numerous insurers for coverage for the *Valdez* oil spill in Texas state court. On June 28, 1994, the successor to Norske Triton Insurance Company Limited, a Norwegian insurer,

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[4/] As respondents point out (Opp. 15), ICI's foreign sovereign status could be adjudicated outside of the removal context. It is no accident, however, that all three of the conflicting ICI decisions, as well as the *Texas Eastern* case below, arose in the removal context. Complex, multi-party insurance coverage disputes often involve nondiverse parties and are typically brought by policyholders who seek to have their state-law coverage claims decided in state courts. The *Exxon Valdez* insurance coverage litigation, discussed *infra* at 4-5, is another recent example of this phenomenon.

[5/] *See, e.g.*, *Gulf Offshore Co.* v. *Mobil Oil Corp.*, 453 U.S. 473, 477 n.3 (1981); *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 257 n.14 (1981); *Dawson Chem. Co.* v. *Rohm & Haas Co.*, 448 U.S. 176, 185 (1980); *Massachusetts* v. *United States*, 435 U.S. 444, 453 (1978); *Curtis* v. *Loether*, 415 U.S. 189, 191 n.2 (1974).

removed the entire case to federal court, arguing that it was a foreign state within the meaning of the FSIA.[6/] In support of this argument, Norske's successor has argued, like ICI here, that it has been placed under "public administration" and that its shares are indirectly held for the benefit of its government.[7/] In seeking a remand to state court, Exxon has relied on *Mobil*, *Murphy Oil*, and *ALCOA*, while acknowledging the conflicting Third Circuit precedent.[8/] The rapidly-growing insolvency of foreign insurers (see Petn. at 14-15) will only increase the significance of this conflict — especially now that the Third Circuit has, in a published opinion, affirmed the legitimacy of the "foreign state" removal maneuver in derogation of prior precedent on the issue.[9/]

[6/] *See* Notice of Removal, *Exxon Corp.* v. *Certain Underwriters at Lloyd's of London*, Nos. H-94-2216, -2217 (S.D. Tex. filed June 28, 1994).

[7/] *See* Brief in Support of Removal, *Exxon Corp.* v. *Certain Underwriters at Lloyd's of London*, Nos. H-94-2216, -2217 (S.D. Tex. filed June 28, 1994), at 6.

[8/] *See* Memorandum in Support of Motion to Remand, *Exxon Corp.* v. *Certain Underwriters at Lloyd's of London*, Nos. H-94-2216, -2217 (S.D. Tex. filed July 21, 1994), at 21.

[9/] Respondents make much of the fact that *Mobil*, *Murphy Oil*, and *ALCOA*, are not published in the Federal Supplement. (Opp. 15.) This fact is unsurprising, however, since these are procedural decisions remanding the cases to state court. The decisions are reported and analyzed in trade journals such as *Mealey's Insurance Litigation Reports* and are well-known in the insurance community. Moreover, as this case and the recent *Exxon Valdez* litigation demonstrate, courts and litigants continue to cite and rely on these decisions. *See also Tennessee Gas Pipeline Co.* v. *Continental Casualty Co.*, 814 F. Supp. 1302, 1306 n.6 (M.D. La. 1993) (noting that *Mobil*, *Murphy Oil*, and the district court decision below constitute "conflicting opinions" on this issue).

2. As explained in the Petition (Petn. 17-21), the lower courts' assumption of subject-matter jurisdiction over the claims against the nondiverse insurers in the *F&C* case conflicts with *Finley* v. *United States*, 490 U.S. 545 (1989), and *Birmingham Fire Ins. Co.* v. *Winegardner and Hammons, Inc.*, 714 F.2d 548 (5th Cir. 1983). Respondents attempt to distinguish the *F&C* case from *Finley* and *Birmingham Fire* by maintaining: (1) the *F&C* case involves "ancillary" rather than "pendent-party" jurisdiction; (2) the counterclaims against the nondiverse excess insurers were asserted by a defendant rather than a plaintiff; and (3) the new supplemental jurisdiction statute, 28 U.S.C. § 1367, renders the conflict with *Finley* and *Birmingham Fire* insignificant. These arguments are meritless.

Respondents' terminological quibbles about ancillary and pendent-party jurisdiction are beside the point.[10/] *Finley* defined pendent-party jurisdiction broadly as "jurisdiction over parties not named in any claim that is independently cognizable by the federal court." 490 U.S. at 549. That is exactly the situation here: The nondiverse excess insurers were not named in any claim over which the federal court had an independent basis of jurisdiction. *Finley* clearly prohibits the counterclaims against these parties, which are "added claims [which] involve added parties over whom no independent basis of jurisdiction exists." *Id.* at 551. Moreover, although *Finley* itself involved a construction of the Federal Tort Claims Act, the decision made clear that its analysis derived from, and applied to, pendent-party jurisdiction asserted in the diversity context. 490 U.S. at 552.

[10/] *See Aldinger* v. *Howard*, 427 U.S. 1, 13 (1976) ("there is little profit in attempting to decide . . . whether there are any 'principled' differences between pendent and ancillary jurisdiction").

Respondents also attempt to distinguish *Finley* from this case on the ground that *Finley* involved pendent-party claims asserted *by a plaintiff* while this case involved pendent-party claims asserted *by a defendant* "haled into court against its will." (Opp. 22-24.) This argument selectively relies on pre-*Finley* decisions and completely ignores the analysis of this very point in the two decisions that matter most for purposes of this Court's review — *Finley* and *Birmingham Fire*. *Finley* expressly rejected respondents' argument, and extended its prohibition on pendent-party jurisdiction to claims asserted by defendants and other parties "haled into court" involuntarily. 490 U.S. at 552-53 & n.6. (See Petn. 18-19.) Likewise, *Birmingham Fire* specifically rejected the plaintiff-defendant distinction as "not significant," and refused to permit a defendant to assert a counterclaim against a nondiverse party over which no independent basis of federal jurisdiction existed. 714 F.2d at 553. (See Petn. 19-20.) Respondents' citations of decisions that appear to embrace the plaintiff-defendant distinction highlight rather than diminish the conflict with *Finley* and *Birmingham Fire*,[11/] and confirm the need for review by this Court to resolve the controversy.

[11/] Respondents misleadingly assert that *Birmingham Fire* involved a noncompulsory counterclaim while the decision below involved a compulsory counterclaim. (Opp. 25-26.) In fact, in *both* cases the claim against the nondiverse parties was "most definitely not a compulsory counterclaim," 714 F.2d at 551, but rather was a new claim against new parties. *Birmingham Fire* is on all fours with the *F&C* case. In both cases, a plaintiff-insurer brought a state law coverage suit under the diversity statute, and the defendant-insured asserted counterclaims against the original plaintiff and attempted to join additional non-diverse insurers to the counterclaim for coverage arising from the same underlying accident. Although both courts relied primarily on this Court's decision in *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978), they reached antithetical results concerning jurisdiction over the nondiverse counterclaim defendants. (See Petn. at 19-20.)

Respondents finally contend that the supplemental jurisdiction statute, 28 U.S.C. § 1367, deprives the conflict concerning pendent-party jurisdiction of lasting significance. This contention reveals a fundamental misunderstanding about the nature of the statute and the continuing significance of *Finley* to cases, like the *F&C* case, that are premised on diversity jurisdiction.

In subsection (a) of Section 1367, Congress overruled *Finley*'s holding concerning pendent-party jurisdiction with respect to cases involving federal question jurisdiction. Subsection (b) of Section 1367, however, codified the rule of complete diversity announced in *Owen Equip. & Erection Co.* v. *Kroger*, 437 U.S. 365 (1978). *See* H.R. Rep. No. 734, 101st Cong., 2nd Sess., 1990, at 29 n.16, *reprinted in* 1990 U.S. Code Cong. & Adm. News 6860, 6875 n.16. *Finley*'s identical rule of complete diversity also derived from *Kroger*. *See* 490 U.S. at 552-53.[12/] The applicability of that rule to counterclaims asserted against nondiverse parties is precisely the issue that has divided the Fifth and Third Circuits. Section 1367 therefore does not reduce the significance of the jurisdictional question raised by the petition: A decision regarding the existence of pendent-party jurisdiction over counterclaims brought against nondiverse parties will apply equally to cases brought before and after the enactment of Section 1367.

[12/] Like the complete diversity rule of *Kroger* and *Finley*, the reference in Section 1367(b) to claims by "plaintiffs" includes counterclaims by defendants against nondiverse parties. *See, e.g., 6247 Atlas Corp.* v. *Marine Ins. Co., Ltd.*, No. 92 Civ. 7064 (RWS), 1994 U.S. Dist. LEXIS 5514, at *12 (S.D.N.Y. April 26, 1994); *Mayatextil, S.A.* v. *Liztex U.S.A., Inc.*, No. 92 Civ. 4528 (LJF), 1993 U.S. Dist. LEXIS 6527, at *7 (S.D.N.Y. May 18, 1993); *see also* C. Wright, *The Law of the Federal Courts* 574 & n.71 (5th ed. 1994).

3. Respondents insinuate that a judgment in favor of petitioner would not change the result in this case because some portion of the *F&C* case might still remain after remand and might operate as "collateral estoppel." (Opp. 8-9, 20-21.) It is telling that respondents cite no authority for this proposition. In fact, the Third Circuit squarely rejected this argument: In their opposition to TETCO's petition for rehearing, respondents argued that TETCO's jurisdictional challenges were "moot" in light of the judgment in the *F&C* case. *See* Appellees' Joint Response to Petition for Rehearing (filed July 12, 1993), at 11-14. The appeals court nevertheless granted rehearing and proceeded to address the jurisdictional bases in all three of the consolidated cases. As Judge Alito noted in his dissent, the determinations of the portion of the *F&C* judgment that should be preserved (if any) in light of the jurisdictional errors and the effect of such a judgment on claims against other insurers involve complex factual and procedural questions that must be decided in the first instance on remand. (App. 47-48.)

CONCLUSION

For the foregoing reasons, and those stated in the Petition, it is respectfully submitted that a petition for a writ of certiorari should be granted.

Respectfully submitted,

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